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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1978

No. **78-1325**

**JOHN OWEN TYLER,**  
Petitioner,

versus

**THE STATE OF GEORGIA,**  
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE  
COURT OF APPEALS OF GEORGIA**

**WESLEY R. ASINOF**  
Attorney for Petitioner  
P.O. Box 461  
Fayetteville, Georgia 30214

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PETITION FOR A WRIT OF CERTIORARI TO THE  
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Now comes John Owen Tyler, and petitions this  
Honorable Court for a writ of certiorari to review the  
judgment of the Court of Appeals of the State of  
Georgia in the case of Tyler v. State, 56233, and shows:

REFERENCE TO REPORTS

The opinion of the Court of Appeals of Georgia is  
reported unofficially in 249 S.E. 2d 109, (advance sheet

of January 4, 1979), and a copy is appended to this petition, and marked Appendix A.

### STATEMENT AS TO GROUNDS OF JURISDICTION

(1) The date of the judgment of the Court of Appeals sought to be reviewed and the time of its entry was September 12, 1978.

(2) The date of the order of the Court of Appeals denying a motion for rehearing was October 5, 1978, and a petition for the writ of certiorari was denied by the Supreme Court of Georgia on November 30, 1978, and a copy of the order of the Court of Appeals of Georgia denying the motion for a rehearing is attached to this petition, and marked Appendix B.

(3) The statutory provision believed to confer upon this Court jurisdiction to review the judgment in question by writ of certiorari is Title 28 U.S.C. §1257 (3) authorizing a review by this Court of the judgment of the highest court of a State in which a decision could be had where any right, privilege or immunity is specially set up or claimed under the statutes of the United States.

### QUESTIONS PRESENTED FOR REVIEW

#### 1.

Whether the admission into evidence in a State criminal trial of a memorandum of the payment of

federal wagering excise tax payments if a violation of 26 U.S.C.A. §4424 prohibiting the divulgence of any return, payment or registration, and making its use against such taxpayer in any criminal proceeding a violation of federal law.

### FEDERAL STATUTES INVOLVED

Title 26, §4424 (c) U.S.C.A.:

"USE OF DOCUMENTS POSSESSED BY TAXPAYER — Except in connection with the administration or civil or criminal enforcement of any tax imposed by this title—

(1) any stamp denoting payment of the special tax under this chapter,

(2) any original, copy, or abstract possessed by a taxpayer of any return, payment, or registration made by such taxpayer pursuant to this chapter, and

(3) any information come at by the exploitation of any such document, shall not be used against such taxpayer in any criminal proceeding."

### STATEMENT OF THE CASE

The petitioner was indicted and tried in the Superior Court of Fulton County, in the State of Georgia, for the state offense of communicating gambling informa-

tion, a felony under the laws of that state. The bulk of the evidence offered against petitioner consisted of gambling records seized by state officers pursuant to a search warrant. Among the items seized was a record or memorandum consisting of a notebook containing sheets of paper with totals. The total of 2 percent appeared on this exhibit, this being the amount of excise tax imposed on wagers under the Internal Revenue Code.

Prior to a trial on the merits counsel for petitioner filed a motion to suppress, and after a hearing the trial court entered an order denying the motion, "except as to the tax stamp, the tax returns, and other items required to be suppressed under 26 U.S.C. Sec. 4424 (c)."

On the trial of the case on its merits the State tendered State's Exhibit #37, identified as "a notebook containing sheets of paper . . . . with totals at two percent. . . ." (Tr. 264). Counsel for petitioner objected, and the trial court overruled the objection and admitted the evidence. Petitioner was convicted, and on appeal raised the federal question under §4424(c). The Court of Appeals refused to decide the federal question, holding that "the objection urged on appeal is not the same objection urged at trial." The Georgia Supreme Court denied certiorari.

### ARGUMENT

The original Wagering Tax Act, requiring gamblers to register, pay an annual occupational tax, and pay ex-

cise tax of 10% on wagers placed with them, was held "constitutionally unenforceable" by this Court in *Marchetti v. United States*, 390 U.S. 39 (88 S. Ct. 697) (1968), and in *Grosso v. United States*, 390 U.S. 62, (88 S. Ct. 709). The statute was later amended by congress so as to protect the taxpayer from disclosure. See: Pub. L. 93-499, §3 (c) (2), Oct. 29, 1974, 88 Stat. 1551. The ten percent excise tax was reduced to two percent.

The Wagering Tax Act, as thus amended by congress, protects the taxpayer from disclosure. This in turn renders the statute constitutionally enforceable. The trial court in this case violated the rights of the petitioner in allowing disclosure, and the Court of Appeals has decided a federal question on a non-federal ground, that is to say, the Georgia rule requiring the objection, and the grounds thereof, to be stated at the time the evidence is offered. In *Staub v. City of Baxley, Ga.*, 355 U.S. 313, (78 S. Ct. 277), the Georgia Court of Appeals refused to pass on the constitutionality of city ordinance because petitioner did not make an attempt to secure permit under ordinance attacked and did not attack specific sections of same ordinance, as required by state practice. The Supreme Court of the United States held that this did not preclude the consideration of the federal question involved. The Supreme Court further held in the same case that whether the rights under federal constitution asserted by appellant were given due recognition by state court was a question as to which appellant was entitled to invoke judgment of United States Supreme Court, and that Supreme



Court had the right to inquire, not only whether the right was denied in express terms, but whether it was denied in substance and effect, by putting forward non-federal grounds of decision that were without fair or substantial support.

In the instant case federal law required petitioner to register as a gambler, obtain the stamp, and pay the two percent excise tax. He could not constitutionally decline to do so, because congress has, by the use of §4424 (c), shielded him from disclosure. This was the cloak of immunity to which he was absolutely entitled. The State of Georgia, by a procedural bar which was not fairly placed upon him, convicted him of violation of its gambling laws by the use of evidence protected from disclosure by federal law. The trial judge was aware of §4424 (c) when it allowed this incriminating evidence to be disclosed to the jury. Petitioner's conviction was thus tainted by the use of this evidence.

### CONCLUSION

The writ of certiorari should be granted, and the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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Wesley R. Asinof  
 Attorney for Petitioner  
 P. O. Box 461  
 Fayetteville, Georgia 30214

### CERTIFICATE

I hereby certify that three copies of the above and foregoing Petition for Writ of Certiorari to the Court of Appeals of Georgia were mailed, postage prepaid, to the following:

Lewis R. Slaton,  
 District Attorney,  
 Fulton County Courthouse,  
 Atlanta, Georgia 30303  
 Hon. Arthur Bolton,  
 Attorney General of Georgia  
 State Judicial Building  
 Atlanta, Georgia 30334

This the \_\_\_\_ day of February, 1979.

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WESLEY R. ASINOF

## APPENDIX

56233.

TYLER v. THE STATE

QUILLIAN, Presiding Judge.

John O. Tyler appeals his conviction of communicating gambling information. The principal evidence for the State consisted of tape recorded telephone conversations obtained through use of a wiretapping device authorized by an investigative warrant issued by the Fulton County Superior Court. The trial court overruled a motion to suppress the evidence obtained by the wiretapping and also allowed in evidence a record maintained in the defendant's home which listed bets made with him, but also included a separate computation of Federal 2% tax on wagers recorded on those papers. Defendant brings this appeal. *Held:*

1. Defendant has enumerated three errors. The first two enumerations are controlled adversely to the defendant by *Morrow v. State*, Ga. App. (No. 56234, decided September, 1978).

2. The third enumeration of error contends that Title 26 U.S.C. 4424, known as the "Wagering Tax Act," prohibits "the divulgence of any return, payment or registration made pursuant to the Wagering Tax Act." Thus, he argues, the papers containing the computation of the wager tax should have been suppressed.

2a

Pretermitted the issue of whether the defendant's computations in his home come within the parameters of the Act, the objection urged on appeal is not the same objection urged at trial. This an appellant cannot do. Where the objection interposed at trial is not argued on appeal it is considered abandoned. *Carney v. State*, 134 Ga. App. 816 (3) (216 SE2d 617). And, where an enumerated error attempts to raise for the first time on appeal an objection which was not presented to the trial court for a ruling, nothing is presented for review. *Patterson v. State*, 228 Ga. 389, 390 (185 SE2d 762). Accordingly, where the objection argued below is not argued here it is abandoned and where an entirely different objection is present on appeal, we cannot consider it because this is a court for review and correction of error committed in the trial court. *Kingston v. State*, 127 Ga. App. 660, 661 (194 SE2d 675).

Judgment affirmed, Webb and McMurray, JJ., concur.

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COURT OF APPEALS  
OF THE STATE OF GEORGIA  
Atlanta, October 5, 1978

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

56233. John O. Tyler v. The State

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

3a

COURT OF APPEALS OF THE STATE OF GEORGIA

Clerk's Office, Atlanta, October 5, 1978

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ MORGAN THOMAS  
Clerk.